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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. WESLEY MARQUIS HARGETT, Defendant and Appellant.	B216862 (Los Angeles County Super. Ct. No. TA095592)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary E. Daigh, Judge. Modified, and, as so modified, affirmed.

Landra E. Rosenthal, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Theresa A. Patterson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Wesley Marquis Hargett appeals from the judgment entered following a jury trial that resulted in his conviction for first degree murder. Hargett was sentenced to a prison term of 50 years to life. He contends the trial court's exclusion of evidence relating to the victim's character for violence infringed upon his right to present a defense, and the trial court erred by failing to instruct, sua sponte, on voluntary manslaughter on a heat of passion theory. We correct two minor sentencing errors, and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *People's evidence.*

Viewed in accordance with the usual rules governing appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303-1304), the evidence relevant to the issues presented on appeal established the following. Sherrie Crain lived with her two daughters, 24-year-old Doneatha McKenzie and 18-year-old Stormy Wade, in Compton on Reeve Street. The victim, Charles Logan, was dating McKenzie. Appellant Hargett is Crain's nephew and the cousin of McKenzie and Wade. Crain had helped to raise Hargett. Latasha Sneed (Tasha), her 17-year-old brother Calvin Sneed, and their mother Lavinnia Sneed, lived a few houses away.[1] The Sneed and Crain families had known each other for years, and they all "grew up like family." Hargett and Calvin were both members of the Nutty Block Crip criminal street gang, and the neighborhood where the Crain and Sneed homes were located was claimed by the gang as its territory.

Tasha and McKenzie "argue[d] all the time." On September 1, 2007, Tasha and McKenzie got into an argument at Tasha's home. Lavinnia, Tasha's mother, slapped McKenzie. Crain, who heard about the argument, walked to the Sneed house and brought McKenzie home, telling her not to argue with " 'these people.' " McKenzie and

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[1] For ease of reference, we hereinafter sometimes refer to the Sneeds by their first names.

Tasha continued to yell at each other as McKenzie and Crain walked back to the Crain home.

Shortly thereafter, Logan drove down the street. Tasha ran out, kicked at his car, spat at him, and called him " 'mother-fucker[ ],' " as well as other names. Logan did not respond, but instead continued driving and went to his own home.

Calvin was attending a party in the nearby Grandee apartments. Calvin was informed of the argument between his sister and McKenzie by another cousin, who told him to come home. Hargett, who lived in Perris, happened to attend the same party. He asked Calvin for a ride back to Reeve Street, to his aunt's house.

Meanwhile, Logan had arrived at the Crain home. He parked his PT Cruiser in Crain's driveway and entered the garage, where he sat down in a chair. Calvin arrived home from the party, approached the Crain house, and attempted to pick a fight with Logan. Calvin accused Logan of saying something offensive to Tasha. Calvin warned him not to bother her and threatened to " 'sock [Logan's] "motherfucking" ass.' " Calvin's fists were "balled up" as he spoke to Logan, as if he intended to hit him. Logan did not respond to Calvin's statements. Crain told Calvin to leave her yard. Calvin then turned his attention to Crain, calling her names.

Hargett walked up and joined Calvin. Calvin and Crain continued arguing. McKenzie, who was inside or walking toward the house, heard someone say to Logan, " 'You're not supposed to be talking to no girl like that' " and " 'where are you from.' " The voice did not sound like Hargett's. Logan responded that he was "too old for that" and "ain't got time for that."

Hargett walked over to where Logan had resumed sitting in the garage. Crain yelled at Hargett and asked him to leave, but he refused, even when she pushed and kicked at him. Instead, Hargett asked what was happening and pushed his way into the yard, ignoring Crain's and McKenzie's statements that they did not want him there. Crain argued with Hargett for approximately five minutes. Hargett did not yell at Crain or call her names. He refused to leave, saying, " 'this is my family house.' " According

to Calvin, after McKenzie and Crain told Hargett to leave and blocked his path into the yard, Logan said, " 'You're not welcome,' " and " 'Leave. We don't want you here.' "

Without warning, Hargett pulled out a small, silver gun and shot Logan in the chest. Logan had not said anything to Hargett, did not make any motions with his hands, and did not have anything in his hands, when he was shot. Logan ran through Crain's house to the backyard, and collapsed. Calvin and Hargett fled.

McKenzie and Wade found Logan in the backyard, holding his hands to his chest and bleeding profusely. He died shortly thereafter from a single gunshot to his chest.

Wade's bedroom window, which had been closed before the shooting, was open and the screen was pushed out, suggesting Logan had exited the house through the window when he fled to the backyard. Photos of Wade's bedroom showed a knife partially hidden beneath a pair of jeans. Detective Joseph Purcell, who examined the crime scene, observed the knife in Wade's room. There was no blood on it.

b. *Defense evidence.*

Hargett testified in his own behalf. On September 1, 2007, he attended a party at the Grandee apartments, far from his residence in Perris. The person who gave him a ride to the party left, so he asked Calvin to give him a ride to his aunt's house. When they arrived at Reeve Street, Hargett learned from Calvin's family members that McKenzie and Tasha had been arguing. Hargett walked to Crain's house to ask why the girls were fighting, since they were close friends. Hargett hoped to make peace between his cousin and Tasha. When he asked his aunt what was going on, however, she cussed at him, hit him, and kicked him. Hargett assumed she was angry because she saw him approach from the Sneeds' house, and believed he was siding with them in the argument.

Logan pulled his car into Crain's driveway. It appeared to Hargett that Logan had an attitude and was "looking for something when he came." Hargett asked why Logan was driving so fast. Logan replied, " 'Don't trip, little homey.' "

Hargett decided to walk back to the Sneeds. He passed Calvin in the middle of the street. He observed Calvin pull out a handgun, cock it, and place it in his pocket.

Hargett turned back toward the Crain house. Logan was sitting by the garage, and Logan and Calvin began arguing heatedly. Calvin had the gun out of his pocket. Hargett, concerned that nothing happen between "my cousin's boyfriend and a homey," took the gun from Calvin. Calvin and Logan continued to argue, and Crain and McKenzie screamed at Hargett. Hargett walked toward Crain in hopes of calming the fight. He said to Logan, " 'Be easy,' " meaning, calm down. Logan looked at him and said, " 'What homey?' " Calvin said, " 'Fuck that bitch ass Nigga.' " Logan stepped back and reached behind his back. Hargett believed he was going for a weapon. Hargett pulled out Calvin's gun, closed his eyes, and fired a single shot towards Logan in hopes of forcing Logan to back up so he could get away before Logan shot at him. He did not intend to hit or kill Logan, and did not know that he had done so until later. Had he intended to kill him, he would have continued shooting. Hargett had been shot at many times before. In his experience, in "the type of lifestyle [he] grew up" with, "when somebody reaches behind [their] back, they pullin' out something."

Hargett fled, and later lied to police about the incident, because he felt no one would believe that he fired in self-defense. His brother had been convicted of a murder Hargett believed he did not commit, after turning himself in. Hargett felt the police were only interested in obtaining a conviction and would not give credence to his account, especially given his gang tattoos.

2. *Procedure.*

Trial was by jury. Hargett was convicted of the first degree murder of Logan (Pen. Code, § 187, subd. (a)).[2] The jury found Hargett personally and intentionally used and discharged a firearm, causing Logan's death (§§ 12022.53, subds. (b), (c), (d)). It found the allegation the offense was committed for the benefit of, or in association with, a criminal street gang, not true. The trial court denied Hargett's motion for a new trial

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[2] All further undesignated statutory references are to the Penal Code.

and sentenced him to a term of 50 years to life in prison.[3] It imposed a restitution fine, a suspended parole restitution fine, a court security assessment, and a criminal conviction assessment. Hargett appeals.

DISCUSSION

1. *The trial court did not err by excluding evidence of the victim's character for violence.*

The defense sought to introduce, and the People sought to exclude, a variety of evidence aimed at establishing the victim's character for violence. The trial court ruled the majority of the evidence inadmissible. Hargett contends the trial court's ruling was constitutional error that infringed upon his right to present a defense. We disagree.

a. *Additional facts.*

Hargett sought to introduce two types of evidence to establish the victim, Logan, had a character for violence. Defense counsel's offer of proof was as follows. The autopsy revealed that Logan had secreted a rock of cocaine in his rectum, in a quantity consistent with possession for sale. One Joseph Matthews would testify that Logan was a drug dealer. A defense expert, Kimi Scudder, would testify that drug dealers usually carry weapons, especially when in gang territory. The trial court ruled that, because the murder was unrelated to drug sales, the evidence was irrelevant and unduly prejudicial under Evidence Code section 352.

Second, the defense sought to introduce the fact of Logan's two prior convictions for robbery in 1993 and 2000, and his 2006 conviction, apparently for a commission of a lewd act upon a child. The trial court ruled the defense could not elicit evidence of the fact of the prior convictions, but could elicit evidence showing Logan's reputation for violence or violent conduct, whether related to those convictions or not.

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[3] At the People's request, allegations that Hargett had served a prior prison term within the meaning of section 667.5, subdivision (b) were dismissed pursuant to section 1385.

Later during the trial, the defense sought to present the testimony of Robert Arias, a witness to Logan's conduct in the 2000 robbery. According to defense counsel, Arias would testify that Logan shoplifted items and was stopped by security when leaving the store. While being handcuffed, he lunged at Arias with a box cutter or knife. The defense theorized that this evidence was relevant to show that when confronted, Logan would respond with violence and would "pull a knife." The prosecutor countered that testimony at Logan's preliminary hearing in the case contradicted this account.[4]

After hearing argument from the parties, the trial court excluded the proffered evidence under Evidence Code section 352. Even assuming Arias would testify Logan lunged at him with a knife, the court found the probative value of the evidence reduced by the fact the incident happened seven years before, in a very different context than the charged crime. Further, the court concluded the proffered evidence would likely cause the jury to speculate.

b. *Discussion.*

"A defendant has the general right to offer a defense through the testimony of his or her witnesses [citation], but a state court's application of ordinary rules of evidence--including the rule stated in Evidence Code section 352--generally does not infringe upon this right [citations]." (*People v. Cornwell* (2005) 37 Cal.4th 50, 82, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Cash* (2002) 28 Cal.4th 703, 727.) Although the United States Supreme Court, in *Chambers v.*

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[4] According to the preliminary hearing testimony of Justine Sarabia, the head store security guard, she observed Logan take a utility knife from a shelf and use it to remove the plastic wrap from compact discs and DVDs. He placed the discs in his jacket and the box cutter in his pants pocket. When he tried to leave the store, Sarabia and other security guards followed him and demanded that he place his hands behind his back. Logan declined to do so, and the guards attempted to handcuff him as he discarded the discs from his coat pocket. Eventually he was handcuffed and placed on the ground by up to eight security guards. The box cutter was recovered from his pocket. Sarabia injured her hand during the cuffing process, but testified that " 'there was no knife out.' "

Mississippi (1973) 410 U.S. 284, 302-303, "determined that the combination of state rules resulting in the exclusion of crucial defense evidence constituted a denial of due process under the unusual circumstances of the case before it, it did not question 'the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures.' [Citation.]" (*Cornwell,* at p. 82.)

A trial court has broad discretion in determining whether evidence is relevant and whether Evidence Code section 352 precludes its admission, and we review the court's ruling for abuse of discretion. (*People v. Carter* (2005) 36 Cal.4th 1114, 1166-1167; *People v. Holloway* (2004) 33 Cal.4th 96, 134.) We will not disturb the trial court's ruling absent a showing that it exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; *People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1310.) This standard of review applies to evidence offered pursuant to Evidence Code section 1103 to prove the victim's aggressive and violent character. (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 447.) A trial court may exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352; *People v. Mills* (2010) 48 Cal.4th 158, 195-196; see also *People v. Shoemaker, supra,* at p. 448.) This discretion allows the trial court broad power " ' " 'to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.' [Citation.]" ' [Citation.]" (*People v. Mills, supra,* at p. 195.) A defendant does not have a right to present all relevant evidence, "no matter how limited in probative value such evidence will be." (*People v. Reeder* (1978) 82 Cal.App.3d 543, 553.)

Evidence of the victim's character is admissible in a criminal action to prove that the victim acted in conformity with that character. (Evid. Code, § 1103, subd. (a)(1).) Accordingly, when a defendant claims self-defense in a murder prosecution, evidence of the victim's violent character may be relevant to show that the purported victim was in

fact the aggressor. The victim's character for violence may be proved by either reputation evidence or specific acts. (*People v. Wright* (1985) 39 Cal.3d 576, 587; *People v. Shoemaker, supra,* 135 Cal.App.3d at pp. 446-447; *People v. Rowland* (1968) 262 Cal.App.2d 790, 797-798.)

Evidence of the victim's character may also be relevant when the defendant claims self-defense, to show the defendant's fear of the victim. "For self-defense, the defendant must actually and reasonably believe in the need to defend, the belief must be objectively reasonable, and the fear must be of imminent danger to life or great bodily injury." (*People v. Lee* (2005) 131 Cal.App.4th 1413, 1427; see also *People v. Butler* (2009) 46 Cal.4th 847, 868 ["both self-defense and defense of others, whether perfect or imperfect, require an actual fear of *imminent* harm"].) Evidence of the victim's character for violence may, therefore, be relevant to prove these elements. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065 [a person claiming self-defense is entitled to corroborate his testimony that he was in fear for his life by proving the reasonableness of such fear].) "The law recognizes the well-established fact in human experience that the *known reputation* of an assailant as to violence, even if specific acts are not within the knowledge of a person assaulted, has a material bearing on the degree and nature of apprehension of danger on the part of the person assaulted . . . ." (*People v. Smith* (1967) 249 Cal.App.2d 395, 404, italics added; *People v. Brophy* (1954) 122 Cal.App.2d 638, 647-648.)

Applying these principles here, the trial court's rulings were correct. The proffered evidence could not have assisted the defense in proving Hargett actually and reasonably believed Logan had a weapon, because there was no offer of proof or evidence that Hargett was aware of Logan's purported character for violence. (See *People v. Thomas* (1969) 269 Cal.App.2d 327, 329 [evidence properly excluded where there was no showing the defendant knew of the victim's prior fights].) All the evidence showed Hargett had met Logan only briefly before the shooting, and there was no animosity between the men. There was no suggestion that Hargett knew, at the time of the shooting, that Logan had a reputation for violence, was a drug dealer, had suffered

prior convictions, or had lunged at security guards with a box cutter during the 2000 robbery. Absent evidence that Hargett was aware of these facts, the evidence could not have helped prove Hargett actually or reasonably believed Logan was reaching for a gun.

Hargett complains that the trial court's exclusion of other testimony that Logan was a drug dealer precluded him from testifying that he knew Logan was a drug dealer. Not so. Defense counsel never made an offer of proof that Hargett knew Logan was a drug dealer or had a reputation for violence, and therefore never ruled on the question. The evidence at trial showed Hargett, who lived in Perris, was rarely in Compton and did not know Logan well. Hargett had been introduced to Logan at his aunt's house, and the two "didn't really talk" beyond exchanging pleasantries occasionally. The evidence presented suggested Hargett had no knowledge of Logan's drug activities or his purported character for violence.

People v. Minifie, supra, 13 Cal.4th 1055, does not compel a contrary result. In *Minifie*, the defendant, Minifie, had shot a member of the Knight family in self defense. He was not prosecuted for the killing. Several years later, he encountered Tino, an associate of the Knight family and a pallbearer at the deceased's funeral, in a bar. Tino challenged Minifie, asking, " 'So it was you?' " (*Id.* at p. 1060.) Tino then punched Minifie, knocking him down, and threatened to hit him with a crutch. Minifie fired shots at Tino, wounding him and another man. At trial, Minifie claimed he acted in self-defense. (*Id.* at p. 1061.) The trial court excluded evidence that the Knight family and their associates had an extensive reputation for violence, that Minifie and his wife had been repeatedly threatened by friends of the Knights, and that associates of the Knight family killed Minifie's friend. (*Id.* at pp. 1061-1063.) On appeal, the California Supreme Court concluded exclusion of the evidence was prejudicial error. (*Id.* at pp. 1060, 1071.) The reputation of the " 'Knight crowd' " was offered to explain Minifie's state of mind (*id.* at p. 1067), and exclusion of the threats to Minifie limited his essential right to argue that his actions were justified. (*Id.* at pp. 1066-1067.)

As is readily apparent, the instant case is easily distinguishable from *Minifie.* Neither Logan nor his associates made threats to Hargett. Hargett barely knew Logan, and there was no evidence of any preexisting animosity between them. There was no offer of proof, and no evidence presented, suggesting that Hargett had any knowledge that Logan had a reputation for violence. Although Hargett's aunt hit and kicked him, the analogy between these facts and the "Knight crowd's" actions in *Minifie* is strained. Under these circumstances, the proffered evidence had no relevance to Hargett's state of mind.

The proffered evidence also lacked sufficient probative value on the question of whether Logan actually reached for a weapon. It is recognized that "one who is turbulent and violent may the more readily provoke or assume the aggressive in an encounter." (*People v. Brophy*, *supra,* 122 Cal.App.2d at pp. 647-648.) However, the probative value of the evidence of Logan's behavior in the 2000 robbery was, as the trial court found, diminished because the robbery occurred approximately seven years before the shooting. (See *People v. Gonzales* (1967) 66 Cal.2d 482, 500 [victim's reputation for violence seven years before the crime held too remote to have evidentiary value].) Moreover, the context of the two incidents was highly dissimilar. The shooting occurred in the context of a verbal argument between neighbors, whereas Logan's purported action of lunging with a box cutter occurred in an entirely different situation, i.e., his attempt to escape when apprehended for shoplifting by several store security guards. Thus, the box-cutter incident was not particularly probative to show Logan tended to become violent under the entirely different circumstances that led to the shooting. Moreover, there was a significant dispute whether Logan actually lunged with the box cutter at all. Sworn testimony at the 2000 preliminary hearing contradicted information gleaned during the defense interview with Arias. The trial court could reasonably have concluded that resolving this discrepancy would have necessitated undue consumption of time and distracted and confused the jurors. As noted, a trial court has broad discretion to exclude evidence when its probative value is outweighed by the probability its admission would necessitate the undue consumption of time, confuse the issues, or mislead the jury.

(*People v. Mills, supra,* 48 Cal.4th at pp. 195-196 [trial court did not abuse its discretion by excluding evidence of victim's boyfriend's violent character, offered to show he, and not defendant, inflicted two of the victim's bruises; any possible probative value the evidence possessed "was 'substantially outweighed by the collateralness of it all and the time [it would take to prove the point]' "].)

Logan's 1999 robbery conviction was even more remote, and the 2006 conviction, apparently for lewd conduct with a child, was entirely unlike the neighborhood argument from which the charged crime arose. Moreover, the bare fact of the convictions would have provided little meaningful evidence regarding Logan's character for violence. The trial court did not prohibit the defense from presenting evidence of Logan's actual conduct in these crimes, but the defense offered none, other than Arias's proposed testimony.

Finally, we discern no error in exclusion of the evidence that Logan was purportedly a drug dealer. The probative value of the proffered evidence was attenuated. The inferential chain proposed by the defense was essentially as follows: Logan was a drug dealer; drug dealers often carry weapons; Logan, therefore, probably had a weapon; because Logan probably had a weapon on his person, Hargett was correct that Logan was reaching for a weapon when Logan placed his hand behind his back.

However, no one, including Hargett, claimed to *actually* see Logan with a weapon at the time of the shooting. No gun or weapon was recovered from Logan's body. Crain testified that Logan had nothing in his hands when Hargett shot him. Calvin testified at the preliminary hearing that he thought Logan was reaching for a gun; at trial he testified, contradictorily, that he did not think Logan had a gun. However, neither he nor Hargett testified they *actually* saw Logan with a weapon.

The only evidence suggesting that Logan possibly possessed a weapon of any kind is, again, quite attenuated. A photograph of the interior of the Crain house showed a knife, partially hidden beneath a pair of jeans, in Wade's bedroom. Circumstantial evidence suggested Logan fled to the backyard through Wade's bedroom window after being shot. When asked whether the knife was hers, Wade answered, "It might have

been." She explained that she kept a knife in her room because sometimes her door would lock when she shut it, and she had to "rig it," i.e., pick the lock. However, she did not recall seeing that particular knife previously, and did not recall placing it in her room. On the other hand, she had never seen Logan with the knife. Detective Purcell testified that he examined the knife and found no blood on it. After being shot, Logan held his hands to his chest, which was bleeding profusely. Had Logan touched the knife, Purcell would have expected to find blood on it. The Crain residence, and Wade's bedroom, were unkempt, cluttered, messy, and dirty. Clothing, food containers, and other items were strewn about in Wade's room, and Purcell observed cockroaches and small rodents scurrying about. Given the unkempt state of Wade's room, the jury was likely to infer that Wade could not reliably discern whether the knife had been present before the shooting. Indeed, Hargett agrees that there was no evidence Logan used a knife or was armed with a knife; he believed Logan had a gun, not a knife. Given the foregoing, we cannot say the trial court abused its discretion by excluding evidence that Logan was a drug dealer, and drug dealers tend to be armed with guns.

In any event, assuming the trial court erred by excluding the evidence, Hargett has failed to establish prejudice. The erroneous exclusion of evidence does not require reversal except where the error caused a miscarriage of justice. (Evid. Code, § 354; *People v. Richardson* (2008) 43 Cal.4th 959, 1001.) " '[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' " (*People v. Richardson, supra*, at p. 1001; *People v. Watson* (1956) 46 Cal.2d 818, 836.) For the reasons we have discussed, the proffered evidence was not strong. There was no showing that Logan was armed with a gun at the time of the shooting. There was no evidence or offer of proof showing Hargett believed Logan had a character for violence, and therefore the proffered evidence could not have factored into the jury's determination of whether Hargett actually or reasonably believed Logan had a gun. The evidence Logan had a knife was likewise weak, and would not have been substantially

bolstered by evidence Logan was a drug dealer, or tried to use a shoplifted box cutter to escape a cadre of security guards who were attempting to apprehend him seven years earlier. The key question was whether Hargett reasonably and actually believed Logan was reaching for a gun, and the proffered evidence, even if credited by the jury, had minimal probative value on that question. It is, therefore, not reasonably probable Hargett would have obtained a more favorable result had all, or part, of the excluded evidence been presented to the jury.

2. *The trial court did not err by failing to instruct, sua sponte, on voluntary manslaughter on a heat of passion/sudden quarrel theory.*

Hargett's jury was instructed on murder, voluntary manslaughter based on an imperfect self-defense theory, and justifiable homicide committed in self-defense. Hargett contends the trial court prejudicially erred by failing to also instruct, sua sponte, on voluntary manslaughter based on a sudden quarrel/heat of passion theory. We disagree.

A trial court must instruct the jury, sua sponte, on the general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case. (*People v. Moye* (2009) 47 Cal.4th 537, 548; *People v. Abilez* (2007) 41 Cal.4th 472, 517; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) Instructions on a lesser included offense must be given when there is substantial evidence from which the jury could conclude the defendant is guilty of the lesser offense, but not the charged offense. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584; *People v. Cook* (2006) 39 Cal.4th 566, 596; *People v. Garcia* (2008) 162 Cal.App.4th 18, 24-25.) Substantial evidence is evidence that a reasonable jury could find persuasive. (*People v. Manriquez, supra,* at p. 584; *People v. Benavides* (2005) 35 Cal.4th 69, 102; *People v. Garcia, supra,* at pp. 24-25.) In deciding whether there is substantial evidence of a lesser included offense, we do not evaluate the credibility of the witnesses, a task for the jury. (*People v. Manriquez, supra,* at p. 585.) The duty to instruct sua sponte on lesser included offenses is not satisfied by instructing on only one theory of an offense if other theories are supported by the evidence. (*People v. Lee* (1999) 20 Cal.4th 47, 61.) We

independently review the question of whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Cook, supra,* at p. 596; *People v. Manriquez, supra,* at p. 587; *People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a); *People v. Manriquez, supra,* 37 Cal.4th at p. 583.) Voluntary manslaughter is the intentional but nonmalicious killing of a human being. (*People v. Moye, supra,* 47 Cal.4th at p. 549; *People v. Benavides, supra,* 35 Cal.4th at p. 102; § 192.) Voluntary manslaughter is a lesser included offense of murder. (*People v. Lee, supra,* 20 Cal.4th at p. 59; *People v. Manriquez, supra,* at p. 583.) A killing may be reduced from murder to voluntary manslaughter if it occurs upon a sudden quarrel or in the heat of passion on sufficient provocation. (*People v. Moye, supra,* at p. 549; *People v. Manriquez, supra,* at p. 583; *People v. Lee, supra,* at pp. 58-59.) The provocation that incites the defendant to homicidal conduct must be caused by the victim or be conduct reasonably believed by the defendant to have been engaged in by the victim. (*People v. Manriquez, supra,* at p. 583.) It may be physical or verbal, but it must be sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*Ibid.*; *People v. Lee, supra,* at p. 59.) Thus, the heat of passion requirement has both an objective and a subjective component. " 'The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively.' " (*People v. Manriquez, supra,* 37 Cal.4th at p. 584; *People v. Oropeza, supra,* 151 Cal.App.4th at pp. 82-83.) A defendant may not set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable person. (*People v. Manriquez, supra,* at p. 584; *People v. Oropeza, supra,* at pp. 82-83.)

Here, no evidence suggested Hargett acted in the heat of passion provoked by the victim. First, there was insufficient evidence Hargett was acting "under 'the actual influence of a strong passion' " when he shot. (*People v. Moye, supra,* 47 Cal.4th at p. 550.) If Hargett's testimony was credited, he approached Crain's house to determine

why the women were fighting, and to try to make peace. In response to Logan's " 'don't trip, little homey' " comment, he walked away. When Hargett observed the heated argument between Calvin and Logan, and saw Calvin's gun, Hargett took the gun from Calvin in order to prevent anyone from getting hurt. He then suggested to Calvin that they go back to the party at the Grandee apartments. He was attempting to calm Logan down, saying " 'be easy,' " when Calvin made an offensive remark and Logan reached behind his back. Thus, Hargett's testimony provided no evidence from which jurors could have concluded he acted " ' "rashly or without due deliberation and reflection, and from this passion rather than from judgment" ' [citation] . . . ." (*People v. Moye, supra,* at p. 553.)

Nor did the testimony of the other witnesses support the conclusion Hargett was acting in the heat of passion. Their "testimony contained no indication that defendant's actions reflected any sign of heat of passion at the time he commenced firing his handgun at the victim. There was no showing that defendant exhibited anger, fury, or rage; thus, there was no evidence that defendant 'actually, subjectively, kill[ed] under the heat of passion.' [Citation.]" (*People v. Manriquez, supra,* 37 Cal.4th at p. 585.) Wade, who was in the house when the shot was fired, testified she heard three men's voices arguing, but could not discern what they were saying or who was arguing. This testimony was too vague to amount to substantial evidence Hargett was acting in the heat of passion, especially in light of his own testimony and that of Crain and Calvin, who were present when the shot was fired.

There was likewise no evidence of legally adequate provocation by the victim sufficient to provoke the shooting. Certainly, there was an argument involving Crain, McKenzie, and Calvin. There was also an argument between Crain, McKenzie, and Hargett, during which Crain, who was Hargett's aunt, pushed and kicked him, and told him to leave. But there was no showing that *Logan,* as opposed to other members of the Sneed and Crain clans, engaged in provocative behavior. There was no evidence Logan taunted Hargett or engaged in a physical struggle with him. (*See People v. Carasi* (2008)

44 Cal.4th 1263, 1307.) Crain testified that Logan said very little in response to Calvin's insults, and did not say or do anything to Hargett.

The only evidence of an interaction between Logan and Hargett was as follows. Calvin testified that Crain and McKenzie told Hargett to leave, and Hargett attempted to push his way through the gate. Logan then said to Hargett, " 'You're not welcome,' " and " 'Leave. We don't want you here.' " Hargett testified that Logan drove his PT Cruiser into the driveway rather fast, appeared to have an attitude, and said " 'Don't trip, little homey,' " when Hargett mentioned his speeding. Logan also said, " 'What homey[,]' " in response to Hargett's plea to " 'be easy.' " Clearly, none of these statements were sufficient " 'to arouse feelings of homicidal rage or passion in an ordinarily reasonable person.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 706.) Logan's words were not unusually provocative, nor did Logan threaten Hargett. (See, e.g., *People v. Manriquez, supra,* 37 Cal.4th at pp. 585-586 [victim called defendant a "mother fucker" and taunted him, repeatedly asserting that if he had a weapon he should use it; this evidence was plainly insufficient to cause an average person to become so inflamed as to lose reason]; *People v. Moye, supra,* 47 Cal.4th at p. 551 [victim's act of kicking defendant's car, when defendant purportedly went to "make peace" with victim after a fight the previous night, was not legally sufficient provocation to cause an ordinarily reasonable person to act out of a heat of passion and kill in response]; *People v. Avila, supra,* 46 Cal.4th at p. 706 ["Reasonable people do not become homicidally enraged" when hearing a gang name called out, even if understood as a gang reference or challenge].)

Under these circumstances, the evidence of both heat of passion and legally adequate provocation was lacking, and the trial court properly omitted instructions on voluntary manslaughter based on the theory of a sudden quarrel or heat of passion. (*People v. Manriquez, supra,* 37 Cal.4th at p. 586.) As explained in *Moye*, "the thrust of defendant's testimony . . . was self-defense--both reasonable self-defense . . . and unreasonable or imperfect self-defense . . . . [¶] . . . [N]o principle of law required the trial judge below to disregard the evidence in order to find that the jury should consider

whether defendant subjectively killed in the heat of passion, when no substantial evidence supported that theory of manslaughter, and the evidence actually introduced on the point--the defendant's own testimony--was to the contrary." (*People v. Moye, supra,* 47 Cal.4th at p. 554.)

Moreover, even assuming arguendo the trial court erred by failing to instruct on a heat of passion/sudden quarrel theory, any error was manifestly harmless. The erroneous failure to instruct on a lesser included offense is, at most, an error of California law alone, and reversal is required only if it appears reasonably probable the defendant would have obtained a more favorable outcome had the error not occurred. (*People v. Moye, supra,* 47 Cal.4th at pp. 555-556; *People v. Breverman, supra*, 19 Cal.4th at p. 165.) As we have discussed *ante,* the primary thrust of the defense was self-defense, either perfect or imperfect. The jury was instructed on these theories and rejected them. Hargett never testified that he shot because he was angry or enraged, and, as we have discussed, any other evidence supporting such a theory was minimal at best. There is no reasonable probability Hargett would have obtained a more favorable outcome had the trial court given the instructions in question.

3. *Correction of the abstract of judgment and custody credits.*

The parties mention in passing two errors made in regard to Hargett's sentencing. First, the trial court imposed a 25-years-to-life enhancement pursuant to section 12022.53. The reporter's transcript reflects that the court imposed the enhancement pursuant to subdivision (b), rather than subdivision (d) of the statute, and that error is reflected in the abstract of judgment as well. It is apparent that either the trial court misspoke, or the reporter's transcript and abstract of judgment contain typographical errors. Section 12022.53, subdivisions (b), (c), and (d) provide a range of enhancements to punish firearm use during specified crimes. Subdivision (b) provides for a 10-year enhancement when a defendant is found to have personally used a firearm. Subdivision (c) provides for a 20-year enhancement when a defendant is found to have personally and intentionally discharged a firearm. Subdivision (d) provides for a 25-years-to-life enhancement when the defendant is found to have personally and intentionally

discharged a firearm, proximately causing great bodily injury or death. Here, the jury found all three enhancements true. Section 12022.53, subdivision (f), provides: "Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment." Accordingly, the 25-years-to-life enhancement should have been imposed pursuant to section 12022.53, subdivision (d). We order the abstract of judgment corrected accordingly. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Garcia* (2008) 162 Cal.App.4th 18, 24, fn. 1.)

Second, the trial court awarded both custody credits and conduct credits. The award of 366 days in actual custody was correct, but the award of 188 days of conduct credit was unauthorized because Hargett was convicted of murder. (§ 2933.2 [person convicted of murder shall not accrue good conduct presentence credit]; *People v. Wheeler* (2003) 105 Cal.App.4th 1423, 1431-1432.) Accordingly, we order the abstract of judgment modified accordingly. (*People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1284 [where a sentence is unauthorized, it is subject to judicial correction whenever the error comes to the attention of the trial court or a reviewing court]; *People v. Cantrell* (2009) 175 Cal.App.4th 1161, 1165; *People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1249.)

DISPOSITION

The abstract of judgment is modified to reflect that the 25-years-to-life enhancement is imposed pursuant to Penal Code section 12022.53, subdivision (d), rather than subdivision (b), and that the Penal Code section 12022.53, subdivision (b) enhancement is stayed. The judgment is modified to award Hargett 366 days of custody credit and no days of local conduct credit, for a total of 366 days precommitment credit. The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting these corrections and to forward a copy to the Department of Corrections. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.